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No. 95-270

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

WORCESTER COUNTY, MARYLAND, *et al.*,
Petitioners,

v.

HONISS W. CANE, JR., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Circuit erred by employing a traditional single-member-district electoral plan, including one remedial district with a narrow black-majority population, to remedy the vote dilution violation resulting from Worcester County's at-large electoral scheme?

2. Whether the Fourth Circuit erred by not analyzing in detail a remedy rejected by both parties and by rejecting the County's request for a remand causing further delay?

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Respondents submit this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Plaintiffs-respondents, black voters of Worcester County, Maryland, filed this class action in November 1992 challenging the at-large, designated-post election system used to elect county commissioners. Despite Worcester's one-fifth black population, never in the County's 253-year history has an African-American candidate been elected to any public county office. The black voters showed that this absolute

exclusion of African Americans resulted from interaction between Worcester's at-large election system, racially polarized voting, and social and historical conditions.

Following a trial in November 1993, the district court held for the plaintiffs, ruling that Worcester's at-large system diluted minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, as interpreted by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In keeping with the three-pronged *Gingles* test, the trial court found first that the County's black population is sufficiently large and geographically compact to form a majority in a single-member district. Pet. App. 5a-7a. It and the court of appeals agreed that the plans introduced by plaintiffs to illustrate proof of *Gingles* factor one comported with traditional districting principles, did not rely upon districts that were geographically bizarre, and appropriately recognized communities of interest. Pet. App. 7a; 38a-39a, n.6.

Second, the court found that black voters in Worcester County are politically cohesive, usually voting for black candidates in elections in which black candidates run for office. Pet. App. 7a-11a. In contrast, white Worcester voters rarely support black candidates, thus demonstrating white bloc voting sufficient to defeat black candidates of choice and to satisfy *Gingles* factor three. The district court found that on average no more than 19 percent of white voters support black candidates. Pet. App. 14a. Petitioners do not dispute the court's findings with respect to either black political cohesion or white bloc voting, conceding that voting is

racially polarized in Worcester County, in satisfaction of *Gingles* factors two and three.

Beyond the three *Gingles* factors, the district court assessed the array of factors set out by the Senate as pertinent to analysis of a Section 2 claim. S. Rep. No. 97-417, 97th Cong. 2d Sess. 28 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 177, 206-07. The court made extensive findings regarding the "totality of the circumstances" that bear upon racial politics in Worcester County, including:

- the uninterrupted exclusion of African-American candidates from public office, Pet. App. 14a;

- the County's use of a candidate residency district system -- akin to an anti-single-shot provision -- an electoral feature that "aggravates the political disadvantage of the County's minorities," Pet. App. 14a;

- historical and continuing patterns of racial discrimination, as evidenced by state and local disenfranchisement schemes such as literacy tests and property ownership requirements for voters and candidates; white voters' overwhelming past support -- lasting into the 1970s -- for racist and segregationist candidates and causes; *de jure* segregation of schools, universities,

and public accommodations through the 1960s; and racial segregation of fraternal organizations, churches, and private social life continuing into the present;

- the present-day legacy of past racial discrimination manifested in gross socioeconomic disparities between black and white citizens and severe racial disparities in voter registration and turnout rates. As of 1990, the trial court found, the voter registration rate for white Worcester Countians was 77 percent, but only 32 percent for black Worcester residents. Pet. App. 50a.

Based upon its collective findings, the district court concluded that Worcester's at-large, designated-post system "interacts with past and present discrimination to deprive African-Americans of Worcester County [of] the same 'opportunity as other members of the electorate to participate in the political process and to elect representatives of their choice.'" Pet. App. 15a-16a, *quoting* 42 U.S.C. §1973(b). Upon review, the Fourth Circuit affirmed the district court's ruling that Worcester's at-large system violated the Voting Rights Act. Pet. App. 38a. This Court denied the County's petition for certiorari. Pet. App. 44a.

A lengthy dispute followed concerning the remedy appropriate for Worcester's Section 2 violation -- characterized by the County's refusal to cooperate in the

remedial process, Pet. App. 70a & 71a, and featuring two County appeals and a stay of 1994 elections obtained by the County. In deference to the asserted preferences of the County Commissioners, the courts adopted a traditional single-member district plan, narrowly tailored to address the violation.[1] Pet. App. 71a-72a. At the direction of the Fourth Circuit, on June 28, 1995 the district court ordered this plan into place. Pet. App. 78a-79a. Worcester County's subsequent motion for recall of the Fourth Circuit mandate was denied, Pet. App. 81a-82a, and on August 15 Chief Justice Rehnquist denied the County's motion to stay the Fourth Circuit mandate.

Elections -- postponed since August 1994 -- currently are proceeding under the new scheme: the primary elections took place on September 12, 1995; the general election will be held on November 7, 1995.

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[1] Plaintiffs had proposed two five-member district plans, one including a remedial district with 62.1% black voting age population (VAP) and one with a 57.8% black VAP district. Although the plaintiffs preferred the 62.1% plan, the courts adopted the 57.8% plan based upon the Fourth Circuit's finding that that plan was more narrowly tailored to achieve compliance with the Voting Rights Act. Specifically, the court stated that the 57.8% plan "adequately remedies the §2 violation, guarantees representation from throughout the County, and is closer to satisfying all of the legislative goals expressed by the County" than the plaintiffs' preferred plan. Pet. App. 71a-72a.

SUMMARY OF ARGUMENT

The Fourth Circuit's unpublished, *per curiam* decision does not present any issue of "overriding national importance" as grandiosely contended by petitioners. Rather, the decisions below apply established precedent to evaluate a basic vote dilution claim and adopt a traditional remedy narrowly tailored to address the vote dilution violation. Worcester County seeks to have this Court review and disturb the detailed factual findings entered by the district court and affirmed by the Fourth Circuit on appeal. Because it is not the general practice of this Court to engage in individualized case evaluation or to review factual findings concurred in by two courts below, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. NO SPECIAL OR IMPORTANT REASON FOR THE ISSUANCE OF A WRIT OF CERTIORARI EXISTS AS REQUIRED BY RULE 10

This case presents a garden variety challenge to racial discrimination in Worcester County's political system. It presents no issue under the Voting Rights Act that is significant or novel, or which merits plenary review by this Court. Moreover, because the Fourth Circuit ruled by unpublished opinion, the effect of the ruling is limited to the individual parties before the Court. No legal precedent has been established. A grant of certiorari would serve only to engage the Court in individualized case review, something it has previously declined to do in this case. Pet. App. 44a

(denying County's petition to review court of appeals' decision that at-large method of elections violated Section 2).

A. The Rulings of the Courts Below Were Based Upon Correct Legal Standards

The district court analyzed the plaintiffs' vote dilution claim as directed by this Court in *Thornburg v. Gingles*. The court of appeals affirmed the district court's analysis and conclusions. Worcester County has pointed to nothing extraordinary about application of *Gingles* to the facts of this case, nor does it contend that any of the findings of fact are clearly erroneous.[2]

Instead, petitioners' basic contention is that *Gingles*' Section 2 analysis is now unconstitutional in light of *Miller v. Johnson*, 115 S.Ct. 2475 (1995). According to petitioners, because plaintiffs took race into account in complying with the first *Gingles* precondition, their "entire case rests on plans that violate *Miller*." Pet. 14. The petitioners are mistaken. *Miller* did not alter Section 2 vote dilution analysis nor the *Gingles* standards. Rather, *Miller* reemphasized the holding in *Shaw v. Reno* that equal protection challenges to redistricting are "'analytically distinct'" from vote dilution claims. *Miller*, 115 S.Ct. at 2485, *quoting Shaw*, 113 S.Ct. at 2830.

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[2] The County does make a "clearly erroneous" argument with respect to remedy, but, as noted infra, it is plainly without merit.

That distinction is readily apparent. The action of a legislature in adopting a redistricting plan in which race is the predominant factor and in which all traditional redistricting principles are subordinated to race is vastly different from the actions of a plaintiff in presenting, and a court in resolving, a complex Section 2 challenge. A plaintiffs' Section 2 case never rests entirely on the construction of a race conscious redistricting plan. The construction of a plan which contains a majority-minority district is merely a precondition (moreover, it is only one of three preconditions) that a plaintiff usually must satisfy before a court may conduct the totality of circumstances analysis required by Section 2. Petitioners are simply wrong in claiming that plaintiffs' "entire case" rests on a race conscious redistricting plan.

Plaintiffs' case rests, instead, upon a myriad of factors showing that the existing system dilutes minority voting strength. It rests upon detailed findings of vote dilution by the lower courts, none of which petitioners contend are clearly erroneous. The heavy handed attempt to equate the complex totality-of-circumstances analysis required by Section 2 with the kind of redistricting condemned in *Miller* is unavailing.[3]

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[3] In the instant case the courts below had no occasion to consider state interests supporting any particular remedial plan, because the County, being opposed to any remedy, advanced no interests to support a remedy. Nevertheless, the record is clear that there exist in Worcester County the most compelling reasons one could present for race-conscious districting: to overcome two and a half centuries of pervasive racial discrimination and to provide black voters a fair opportunity to elect a candidate of their choice for the very first time.

This Court unanimously rejected an argument similar to that raised by Worcester County in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). In *Voinovich*, the district court concluded that "§2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation." 113 S.Ct. at 1156. The Court disagreed. It held that Section 2 contains "no *per se* prohibitions against . . . majority-minority districts," and approved the *Gingles* requirement that Section 2 plaintiffs "must show that the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district.'" *Id.* at 1157.

In *Holder v. Hall* seven members of the Court, either explicitly or by necessary implication, rejected Justice Thomas's argument that the Court's Section 2 vote dilution jurisprudence was "repugnant to . . . the ideal of a color-blind Constitution." 114 S.Ct. at 2598. *Id.* at 2588 ("*Stare decisis* concerns . . . require me to reject Justice THOMAS' suggestion that we overhaul our established reading of §2")(O'Connor, J., concurring in part and concurring in the judgment); *Id.* at 2621 n.3 (the *Gingles* vote dilution analysis applies to "the case before us")(Blackmun, J., dissenting); *Id.* at 2627("[i]t is crystal clear that Congress intended the 1982 amendment to cover non-access claims like those in *Bolden* and *Gomillion*")(Stevens, J., dissenting); *Id.* at 2585 ("[i]n a §2 vote dilution suit . . . a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice")(Kennedy, J., plurality opinion). In vote dilution challenges such as this, that benchmark may properly be a system containing one or more majority-

minority districts. *Id.* at 2589 (O'Connor, J., concurring in part and concurring in the judgment).

More recently, the Court affirmed the validity of Section 2 and the *Gingles* analysis. It made clear in *Dewitt v. Wilson*, 115 S.Ct. 2637 (1995), decided the same day as *Miller*, that it is constitutionally permissible for legislatures to consider race as one among several factors in redistricting decisions -- even without compelling cause. Not only is Worcester's extremist reading of *Miller* inconsistent with *DeWitt*, but it would wreak havoc on representative government nationwide, casting doubt upon the validity of districted election plans in place at every level of government.

Here, as in *DeWitt*, race was merely one among several factors taken into account in development of the plaintiffs' proposed remedial plans. The courts below have repeatedly rejected the County's claim that Worcester's new single-member-district plan raises concerns about "racial gerrymandering." In sharp contrast to the Georgia congressional district at issue in *Miller*, the district plan in this case was characterized by a unanimous Fourth Circuit panel as closely aligned with traditional districting principles and as consistent in shape with the County's old residency districts. Pet. App. 38a-39a n.6. The plan adheres to "the historical north-south division of the County and the natural boundaries created by County waterways." *Id.* Perhaps most significant is the appellate court's finding that the district recognizes a distinctive "community of interest" heretofore denied recognition by Worcester County.

> [T]he uncontradicted evidence before the district court revealed that the citizens within the proposed majority African-American district shared common socioeconomic and political concerns. . . . Drawing districts based upon such common interests is perhaps one of the most often invoked districting principles.

Id., *citing Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973). *Miller* expressly approved such districting that fosters "respect for . . . communities defined by actual shared interests." 115 S.Ct. at 2488.

The County's contention that *Miller* bars voting rights plaintiffs and courts from taking race into account when establishing proof of the first prong of *Gingles* is plainly frivolous. *Gingles* requires plaintiffs in Section 2 cases to take race into account by establishing that it is possible to create majority-minority districts. To accept the County's argument would render *Gingles* a nullity, and would preclude any finding of Section 2 liability or any remedy for minority vote dilution.

B. The Court of Appeals Engaged in Correct Decisional Procedures in Resolving this Case

The County also seeks review of the adequacy of the processes employed by the Fourth Circuit in its June 1995 resolution of this case. The County claims that the appeals court erred by (i) failing to fully articulate its reasons for rejecting the district court's remedy for the primary elections

and (ii) ordering implementation of a districting plan ("Plan B") without further delaying the election to permit the district court a greater opportunity to reexamine it. Pet. 17-19. Not only are these issues inappropriate for review by this Court, but the County is also wrong on their merits.

First, because the court of appeals chose not to publish its opinion, it deemed its issues not to be noteworthy. 4th Cir. I.O.P. 36.4. Furthermore, its unpublished status will preclude it from having any broad precedential effect. *Id.*, I.O.P. 36.6. Thus, the methodology by which it produced the unpublished opinion presents no issue of broad import that would be appropriate for this Court's review.

Second, at oral argument neither party supported either part of the district court's remedy (a system of single-member-district elections for the primary and cumulative voting for the general election). Pet. App. 70a. The County, therefore, waived any claim with respect to the method employed by the court of appeals in rejecting that plan.

Finally, at the liability stage the district court had fully examined Plan B, which the court of appeals ultimately ordered. Pet. 19 n.19. Thus, it had been "out on the table" and evaluated by all. This plan was not as favorable to plaintiffs as their primary proposal ("Plan A"). The court of appeals deferred to the County's professed legislative goals by rejecting Plan A for Plan B. Having failed to proffer a viable alternative, Pet. App. 70a, the County can hardly complain that the court of appeals ordered the one plan of the only two

viable plans submitted that best accommodated the County's goals.

As a review of the court of appeals' decision makes clear, even on the day of oral argument, the County was still seeking inappropriately to further delay the electoral process. Because the court of appeals determined that a remand to permit further district court review of Plan B would only unnecessarily delay an election that had already been delayed a year, its finding that further delay was "unwarranted" was most reasonable. Pet. App. 71a. At the very least, its equitable assessments pose no certiorari issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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